Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PAUL JAMES ADAIR,
Petitioner,

v.

VERN SMITH, WARDEN OF CENTINELA STATE PRISON AND ATTORNEY GENERAL OF CALIFORNIA
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err when it ruled that appellant's Sixth Amendment right to a fair trial by an impartial jury was not denied when a juror deliberately failed to disclose material information during voir dire, thereby stripping appellant of his right to have his counsel excuse the juror based on that material information ?

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PETITION FOR WRIT OF CERTIORARI

Appellant Paul James Adair ("Adair") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS, ORDERS, JUDGMENTS AND TRANSCRIPTS BELOW

The unpublished opinion and judgment of the United States Court of Appeals appears at Appendix A 1a to the petition.

The order of the United States Court of Appeals setting out the issue on appeal appears at Appendix B 5a to the petition. Adair's notice of appeal appears at Appendix C 7a to the petition. The order of the United States District Court adopting findings, conclusions, and recommendations of the United States Magistrate Judge appears at Appendix D 11a to the petition. The judgment of the United States District Court appears at Appendix E 13a to the petition. The report and recommendation of the United States Magistrate Judge appears at Appendix F 14a to the petition.

A portion of the reporter's transcript of jury voir dire on September 9 and 10, 1996 appears at Appendix G 34a to the petition. A portion of the reporter's transcript on appeal of proceedings before the Honorable Joan M. Borba on September 25, 26 and 27, 1996 and August 21, 1997 appears at Appendix H 40a to the petition.

JURISDICTION

The United States Court of Appeals issued an unpublished opinion on May 20, 2002. This Petition for Writ

of Certiorari follows within 90 days. Adair invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

A. The Voir Dire.

On September 9, 1996, a jury trial commenced in Department A of the San Bernardino Superior Court, the Honorable Joan M. Borba presiding. At the start of the jury selection process, the trial judge instructed the prospective jurors, among other things, as follows: "listen carefully to the questions so that they need not be repeated when you are in the jury box. This questioning called voir dire is our effort to

have you tell us about any experience that may influence you in hearing this case or in applying the law. You will help the process if you would volunteer any information about your experiences even though you would feel it would not interfere with your function as a juror even though no question is put directly to you." Appendix G 34a-35a, 37a-39a. During voir dire, the trial judge asked the entire panel of jurors: "Are any of you peace officers?" Appendix G 35a-37a. One prospective juror announced he was in law enforcement and was excused. *Id.* The trial judge also excused another juror after the juror stated he was a retired chief of security with current peace officer status, and the prosecutor announced he had worked for the juror. *Id.* Notwithstanding these comments, questions and the excusing of two prospective jurors with law enforcement backgrounds, one juror who was selected ultimately to serve on the venire ("Juror 4") did not reveal that he had been employed with the Ontario Police Department which was the same law enforcement agency which apprehended Adair.

B. The Post-Trial Jury Note Informing The Court That Juror 4 Failed To Disclose His Prior Law Enforcement Experience.

On September 27, 1996, the jury notified the trial judge that it had reached a verdict. Prior to the reading of the verdict, the jury sent the following note to the trial judge: "To speak with the judge or be reassured as to one of the jurors [Juror 4] has now brought out that he was a former active officer with the Ontario Police Department. This didn't come out during voir dire, and we as a jury don't feel that it influenced our decisions. We didn't know until after the decisions were made, but the man is [sic] has been very vocal

and forceful in his opinions. Does this make any difference in our case?" Appendix H 40a-43a.

C. Juror 4's Admission During Examination Of His Deliberate Failure To Disclose His Prior Law Enforcement Experience.

On September 27, 1996, the trial judge examined the juror about whom the jury note was written--Juror 4[1/]. During the trial judge's examination, it was revealed that Juror 4 decided not to reveal his prior law enforcement experience because he did not believe that experience would impact his ability to be an impartial juror.

> Q (by the trial judge): Why didn't you inform us of this [Juror 4's prior law enforcement experience] during the jury selection process?
>
> A (by Juror 4): I didn't believe that my experiences 26 years ago had anything to do with my ability to reach a verdict. Appendix H 43a-45a.

The trial judge also allowed the prosecution and Adair's counsel, Ms. Torres, to examine the juror about whom the jury note was written. During Torres' examination, it was revealed that this juror was aware of the fact that the court and counsel sought information from all of the jurors including himself regarding employment in law enforcement,

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[1] Juror 4 is incorrectly described as "Juror Seat Number 6" in the reporter's transcript of the examinations of Juror 4.

that he remembered his prior law enforcement employment, and, nonetheless, decided not to reveal it. Appendix H 46a-48a.

Q (by Torres) Sir, you indicated that you did not bring this [Juror 4's prior law enforcement experience] up because you did not believe that your experience 25 years ago would have any effect on your experience as a juror in this particular case; is that correct?

A (by Juror 4) My ability to reach a decision, yes.

* * *

Q Is this a decision that you made at the time that you were being questioned as to your capabilities as a prospective juror?

A Yes, ma'am.

Q Now, you were present when the rest of the jurors were being questioned, is that correct?

A Correct.

Q And you were also present when the judge asked whether there were any active police officers in the jury panel; it that correct?

A Yes, I was.

Q And you also saw that those police officers were excused summarily; is that correct?

A I'm not sure that there were any active police officers. I don't recall. I do recall one of the questions asked was the last day of P.O.S.T. certification which seemed to the Court to have been an important issue, so I felt that 26 years ago was unimportant at that time. I felt I had more experiences in the meantime that allow me to reach decisions. It was a very minute portion of my life experiences.

Q And in spite of the fact that you were aware that questions were being asked as to officers as to when their duty expired, in essence, in spite of that, you felt that there was no reason to bring up the fact that you had been a police officer in the past?

A That's correct.

Q And did you hear the questions made to all of the jurors by the judge, by myself, and probably by Mr. Scollon [the prosecutor] as to whether you had heard the questions put to the other jurors and whether there was anything

that you wanted to bring up in regards to questions asked other jurors?

A Yes, I did.

Q And at that time you did not believe that it was your responsibility to tell the Court that you had been a police officer?

* * *

A Ms. Torres, the way I understood the question was it was my discretion as to whether I felt that any of the questions that had been asked prior by yourself or Mr. Scollon weighed in my ability to make a reasonable decision, and it was my judgment that my past experience would not deter me from making a good, solid decision based on the evidence presented. *Id.*

Following Juror 4's examination, the trial judge inquired of the jury foreperson when the jury became aware of Juror 4's former peace officer status and whether that fact influenced his and the other jurors' decision. Answering the latter question in the negative, the foreperson stated that the jury did not become aware of Juror 4's status until after a verdict was reached. He did confirm, however, that Juror 4 was very vocal and forceful in his opinions during deliberations. Appendix H 49a-52a. Finally, the trial judge called the remaining jurors and posed one sole question whether anyone had unduly influenced their decision.

Without any more inquiry, each of the jurors answered that he or she had not been so influenced. Appendix H 52a-54a.

Following this colloquy, the trial judge denied Adair's motion for a mistrial based on juror misconduct. Appendix H 55a-61a. The trial judge did not make any factual findings regarding actual or implied bias on Juror 4's part. The trial judge simply found that Juror 4 was justified in not disclosing his prior law enforcement experience.

> THE COURT: Under the circumstances, Ms. Torres, the fact that he [Juror 4] was a police officer for a period of seven months in 1970, I think the fact that he didn't reveal it to us is not important. I think that he was justified based upon his rationale for not disclosing that information. Appendix H 59a-60a.

The jury found Adair guilty of all counts, including attempted murder. Appendix H 60a-63a.

D. The Trial Judge's Finding Of No Actual Bias On Juror 4's Part.

On January 7, 1997, Adair made a request for a finding of juror misconduct relating to Juror 4's deliberate failure to disclose his prior law enforcement experience. The trial judge denied Adair's request based on the factual findings that (1) the questions asked of the potential jurors regarding law enforcement experience did not compel Juror 4 to disclose his prior law enforcement experience, and (2) "there was no actual bias against the defendant in reaching a fair and impartial verdict . . . .".

E. Adair's Conviction Is Upheld On Appeal.

Adair appealed from his conviction. Adair raised six grounds on appeal, including juror misconduct. The California Court of Appeal affirmed the judgment in an unpublished decision. *People v. Adair* (May 10, 1999) E021458 [nonpub. opn.]. The California Supreme Court denied Adair's petition for review. *People v. Adair*, (September 1, 1999) S079804 [unpub. order].

F. Adair's Petition For A Writ Of Habeas Corpus Is Denied.

Adair then began this action by filing a petition for a writ of habeas corpus with the district court. In this petition, Adair stated two grounds in support of his petition, including the ground that his Sixth Amendment right to a fair trial by an impartial jury was denied. The Attorney General filed an answer to this petition, admitting the underlying factual claims.

The petition was referred to Magistrate Judge Charles F. Eick, who filed a written recommendation that the petition be denied. Appendix F 14a-33a. With respect to the implied bias issue, Magistrate Judge Eick found that bias could not be presumed from the fact that Juror 4 was a law enforcement officer. Appendix F 32a-33a. Magistrate Judge Eick did not address the issue of whether bias could be presumed from the fact that Juror 4 deliberately failed to disclose his prior law enforcement experience. District Judge Virginia A. Phillips entered an order adopting the findings and conclusions of Magistrate Judge Eick, Appendix D 11a-12a, and entered a judgment denying the petition. Appendix E 13a. Adair timely filed a notice of appeal. Appendix C 7a.

On appeal, the Ninth Circuit issued an opinion, holding that Adair's Sixth Amendment right to a fair and impartial jury was not violated. Appendix A 1a.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING THAT A JUROR'S DELIBERATE FAILURE TO DISCLOSE MATERIAL INFORMATION DURING VOIR DIRE DID NOT VIOLATE ADAIR'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY REFLECTS A MISUNDERSTANDING OF THE DOCTRINE OF IMPLIED BIAS AMONG THE CIRCUIT COURTS, WHICH THIS COURT SHOULD CLEAR UP

Paul Adair's Sixth Amendment right to a fair and impartial jury was denied when a potential juror deliberately failed to disclose material information during voir dire. Juror 4 deliberately failed to disclose the fact that he was a police officer for the police department which was involved in the apprehension of Adair. The facts show that Juror 4 withheld that information to improve his chances of serving on the jury. During voir dire, two prospective jurors were excused when they disclosed their law enforcement experience. Juror 4 realized that he would also have been excused if he disclosed his law enforcement experience. Thus, Juror 4 withheld that information. Due to his failure to disclose his law enforcement experience, Adair's counsel did not exercise a peremptory challenge to excuse him, and Juror 4 sat on Adair's jury. Accordingly, Adair's Sixth Amendment right to a fair trial by an impartial jury was denied because Juror 4, a biased juror, participated in the decision on Adair's fate. Juror 4 and the rest of Adair's jury found Adair guilty of attempted murder. As a result, Adair was sentenced to approximately twenty-five years in state prison.

On appeal, Adair argued that Juror 4's conduct constituted implied bias and, thus, Adair's constitutional right to a fair and unbiased jury was denied. Under the doctrine of implied bias, a juror's deliberate failure to disclose material information during voir dire constitutes implied bias. The reasoning behind this doctrine is that a juror who deliberately withholds material information in order to improve his chances of serving on a jury has too much stake in the matter to be considered unbiased. While this Court has never explicitly applied the doctrine of implied bias, this Court has recognized the existence of the doctrine and has provided general guidelines with respect to the application of the doctrine.

The Ninth Circuit rejected Adair's implied bias doctrine argument, erroneously holding that Adair's Sixth Amendment right to a fair and impartial jury was not violated, despite the fact that Juror 4 obtained his place on the jury by deliberately withholding material information. This Court should grant Adair's petition in order to clarify the meaning and application of the doctrine of implied bias, so that Adair and all future criminal defendants are assured their constitutional right to have their fates decided by a fair and impartial jury.

ARGUMENT

THE NINTH CIRCUIT ERRED WHEN IT RULED THAT ADAIR'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WAS NOT DENIED WHEN JUROR 4 DELIBERATELY FAILED TO DISCLOSE MATERIAL INFORMATION.

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate ...[petitioner's] right to a fair trial." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.[2] The necessity of

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[2] Relying on opinions of this Court, the Sixth Circuit has stated the critical importance of the peremptory challenge: "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. *See Lewis v. United States*, 146 U.S. 370, 376 (1892). Although 'there is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges,' *Stilson v. United States*, 250 U.S. 583, 586 (1919), nonetheless the challenge is 'one of the most important of the rights secured to the accused,' *Pointer v. United States*, 151 U.S. 396, 408 (1894). The denial or impairment of the right is reversible error without a showing of prejudice. *Lewis v. United States, supra; Harrison v. United*

truthful answers by prospective jurors if this process is to serve its purpose is obvious." *McDonough Power Equipment, Inc. v. Greenwood et al.*, 464 U.S. 548, 554 (1984).

"The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. *See United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). Like a judge who is biased, *see Tumey v. Ohio*, 273 U.S. 510, 535 (1927), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991)." *Dyer*, 151 F.3d at 973, n. 2.

"[I]mplied bias presents a mixed question of law and fact which is reviewable de novo." *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000). "In extraordinary cases, courts may presume bias based on the circumstances." *Dyer*, 151 F.3d at 981. A juror's deliberate failure to disclose material information during voir dire constitutes circumstances which can give rise to a finding of implied bias. *Id.* at 982. Bias should be presumed where a juror's deliberate withholding of material information introduced "destructive uncertainties" into the fact-finding process. *Id.* at 983.

States, 163 U.S. 140 (1896); *cf. Gulf, Colorado & Santa Fe R. Co. v. Shane*, 157 U.S. 348 (1895). 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' *United States v. Lewis*, 146 U.S. at 378." *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981)(parallel citations omitted). ". . . [D]eliberate concealment or purposefully incorrect responses during voir dire suffice to show a prejudicial impairment of the right to exercise of peremptory challenges." *Id.*

This Court has never explicitly applied the doctrine of implied bias. However, this Court has described general guidelines for applying the doctrine. Justice O'Connor provided this Court's clearest guidelines with respect to the application of the implied bias doctrine in her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982). "While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of 'no bias,' the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." Thus, in her discussion of the implied bias doctrine, Justice O'Connor focused on the relationship between the potentially biased juror and the parties or the issues in the litigation.

Most circuits have recognized and applied the doctrine of implied bias. *See, e.g., United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997); *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988); *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); *Hunley v. Godinez*, 975 F.2d 316, 318-320 (7th Cir. 1992); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998); *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996).

The circuits have focused on two categories of implied bias. First, the circuits have focused on the category identified by Justice O'Connor in *Smith v. Phillips*: the relationship between the potentially biased juror and the parties or the issues in the litigation. For example, in *United States v. Gonzalez*, 214 F.3d 1109, 1112-1114 (9th Cir. 2000),

the Ninth Circuit found that a juror was impliedly biased because the juror's ex-husband dealt and used cocaine, which was the same drug and conduct at issue in the case, and the juror's ex-husband's drug dealing was one of the reasons for her divorce and the break-up of her family. Based on this finding of implied bias (and actual bias as well), the Ninth Circuit reversed and remanded for a new trial. *Id.* at 1114.

Second, the Ninth and Tenth Circuits have focused on a second category of implied bias: a juror's failure to disclose material information during voir dire.[3] *See, e.g., Dyer v.*

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3 While this Court has not explicitly discussed the implied bias doctrine in connection with a potential juror's failure to disclose material information, this Court has discussed the fact that a potential juror who obtains a place on the jury by giving false information during voir dire turns the jury process into a sham. *Clark v. United States*, 289 U.S. 1 (1933), involved a juror who knowingly gave misleading and false answers in response to questions during voir dire. The Supreme Court affirmed a criminal contempt conviction of the juror. The Supreme Court based its holding on the rule that juror bias is presumed when a juror lies in order to secure a seat on the jury.

> The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no

Calderon, 151 F.3d 970, 973 (9th Cir. 1998); *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996).[4/]

In *Dyer*, Dyer was tried for murder in state court. During voir dire, the potential jurors were asked the following two questions: "Have you or any of your relatives or close friends ever been the victim of any type of crime?" "Have you or any of your relatives or close friends ever been accused of any offense other than traffic cases?" *Id.* at 972. The trial judge instructed the potential jurors to "make sure that while this process is going on that you hear every question that is asked and every answer that is given . . . . [A]s I've indicated to you before, you have a right to hear, and a duty to hear. So make sure that you do." *Id.* at 980.

Juror Freeland was the last potential juror to be seated. She sat through the questioning of 74 potential jurors over the course of five days. During this time, juror Freeland watched as several potential jurors disclosed that they were victims of burglaries, and most of them were excused by peremptory challenge. When her turn came, juror Freeland answered "no" to the two questions above. *Id.* In fact, juror Freeland should have answered "yes" to both questions. Juror

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> different. The doom of mere sterility was on the trial from the beginning.

Id. at 11.

[4] The Second Circuit has recognized a third type of bias: inferable bias. *United States v. Torres*, 128 F.3d 38, 46-47 (2d Cir. 1997). Under the doctrine of inferable bias, ". . . the court is allowed to dismiss a juror on the ground of inferable bias only after having received responses from the juror [during voir dire] that permit an inference that the juror in question would not be able to decide the matter objectively." *Id.* at 47.

Freeland deliberately failed to disclose that she had been the victim of many burglaries and that her brother had been shot and killed six years earlier. She also failed to disclose that her husband had been arrested on rape charges a month before the trial. *Id.* at 972, 980. Juror Freeland was named as an alternate and eventually was seated as a juror and helped decide Dyer's fate. *Id.* at 972. Dyer was convicted of murder and sentenced to death. *Id.*

Dyer appealed his conviction. After exhausting his state court remedies, Dyer filed a petition for writ of habeas corpus in federal court. Dyer argued that his Sixth Amendment right to a fair trial by an unbiased jury was denied because juror Freeland failed to disclose material information during voir dire. The district court denied the writ petition. A divided panel of the Ninth Circuit affirmed, and then the Ninth Circuit decided to rehear the case ***en banc***. *Id.* at 973.

The Ninth Circuit reversed the district court, deciding that Dyer's Sixth Amendment right to a fair trial by an unbiased jury was denied because juror Freeland deliberately failed to disclose material information during voir dire. The Ninth Circuit did not decide whether juror Freeland had actual bias because this Court found that the circumstances gave rise to a finding of implied bias by her. *Id.* at 981.

The Ninth Circuit stated its reasoning as follows:

> Jessica Freeland was not involved in the crime which was the subject of the case, nor did she have a personal relationship with any of the trial participants. But there is every indication that she was not indifferent to service on the jury. After watching a number of potential

jurors disclose relatively minor crimes and get dismissed, she chose to conceal a very major crime--the killing of her brother in a way that she knew was very similar to the way Dyer was accused of killing his victims. She also failed to disclose many other facts that would have jeopardized her chances of serving on Dyer's jury. Later on, when she was questioned about her brother's death, she lied once again by pretending she thought it was an accident, and by telling the judge that no one in her family had testified about the killing. The inference we draw from all this is that Freeland lied in order to preserve her status as a juror and to secure the right to pass on Dyer's sentence.

We don't know why Jessica Freeland so cherished her seat on Dyer's jury. Jury service is a civic duty that citizens are expected to perform willingly when called upon to do so. But there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury

> room that the doctrine of implied bias is meant to keep out.
>
> A juror, like Freeland, who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror--to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions--with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id. at 982-983.

Recently, in *Green v. White*, 232 F.3d 671 (9th Cir. 2000), the Ninth Circuit applied the doctrine of implied bias in finding that a defendant's Sixth Amendment right to a fair trial by an unbiased jury was denied because a juror deliberately failed to disclose material information during voir

dire. In *Green*, Green was tried for murder in state court. Before trial, potential juror Adams completed a juror questionnaire form. The form asked whether Adams had ever been convicted of a felony. Adams replied that he had not. In fact, Adams had a felony conviction for passing bad checks over 30 years earlier. *Id.* at 672. During voir dire, the potential jurors were asked the following question: "Have any of you or any member of your family or close friends to your knowledge ever been arrested, charged or arrested for these types of crimes similar to in case [sic], shootings, murders, any kinds of assaults?" Juror Adams deliberately failed to disclose that he had been convicted of assault while in the Army and served six months in the brig many years earlier. *Id.* at 673. Juror Adams was seated as a juror and Green was convicted of murder. *Id.* at 672. Green appealed his conviction. After exhausting his state court remedies, Green filed a petition for writ of habeas corpus in federal court. Green argued that his Sixth Amendment right to a fair trial by an unbiased jury was denied because juror Adams failed to disclose material information during voir dire. The district court denied the writ petition. *Id.*

The Ninth Circuit reversed the district court, deciding that Green's Sixth Amendment right to a fair trial by an unbiased jury was denied because juror Adams deliberately failed to disclose material information during voir dire. The *Green* court held that "Adams' pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced 'destructive uncertainties' into the fact-finding process, and, under *Dyer*, we must presume bias under these circumstances." *Id.* at 676. Accordingly, the *Green* court remanded to the district court with instructions to grant a writ of habeas corpus for Green unless the state court granted a new trial within a reasonable time. *Id.* at 678.

Under the doctrine of implied bias, as applied in *Dyer* and *Green*, the Ninth Circuit should have found that Adair's Sixth Amendment right to a fair trial by an unbiased jury was denied because Juror 4 deliberately failed to disclose material information during voir dire.

Just like the trial judge in *Dyer*, the trial judge in Adair instructed all prospective jurors, including Juror 4, to provide information in response to general questions asked of the venire. At the start of the jury selection process the trial judge instructed the prospective jurors, among other things, as follows: "listen carefully to the questions so that they need not be repeated when you are in the jury box. This questioning called voir dire is our effort to have you tell us about any experience that may influence you in hearing this case or in applying the law. You will help the process if you would volunteer any information about your experiences even though you would feel it would not interfere with your function as a juror even though no question is put directly to you." Appendix G 37a-39a (emphasis added).

During voir dire, the trial judge asked the entire panel of jurors: "Are any of you peace officers?" Appendix G 35a-37a. One prospective juror announced he was in law enforcement and was excused. *Id.* The trial judge also excused another juror after the juror stated he was a retired chief of security with current peace officer status, and the prosecutor announced he had worked for the juror. *Id.*

Just like the juror in *Dyer*, Juror 4 heard the question about law enforcement experience and watched other potential jurors excused when they revealed their law enforcement experience. Just like the *Dyer* juror, Juror 4 deliberately failed to disclose his law enforcement experience. Specifically, Juror 4 did not reveal that he had been employed

with the Ontario Police Department which was the same law enforcement agency which apprehended Adair. Presumably, like the *Dyer* juror, Juror 4 intentionally withheld his law enforcement experience because he wanted to decide Adair's fate and realized that he would be excused like the other jurors if he disclosed his law enforcement experience.

An examination of Juror 4 at the conclusion of the trial and deliberations establishes that Juror 4 heard the question to the venire about law enforcement experience and decided not to reveal his prior law enforcement experience. Appendix H 43a-45.

> Q (by the trial judge): Why didn't you inform us of this [Juror 4's prior law enforcement experience] during the jury selection process?
>
> A (by Juror 4): I didn't believe that my experiences 26 years ago had anything to do with my ability to reach a verdict. Appendix H 43a-44a.
>
> * * *
>
> Q (by Adair's counsel) Sir, you indicated that you did not bring this [Juror 4's prior law enforcement experience] up because you did not believe that your experience 25 years ago would have any effect on your experience as a juror in this particular case; is that correct?
>
> A (by Juror 4) My ability to reach a decision, yes.

* * *

Q Is this a decision that you made at the time that you were being questioned as to your capabilities as a prospective juror?

A Yes, ma'am.

Q Now, you were present when the rest of the jurors were being questioned, is that correct?

A Correct.

Q And you were also present when the judge asked whether there were any active police officers in the jury panel; it that correct?

A Yes, I was.

Q And you also saw that those police officers were excused summarily; is that correct?

A I'm not sure that there were any active police officers. I don't recall. I do recall one of the questions asked was the last day of P.O.S.T. certification which seemed to the Court to have been an important issue, so I felt that 26 years ago was unimportant at that time. I felt I had more experiences in the meantime that allow me to reach

decisions. It was a very minute portion of my life experiences.

Q And in spite of the fact that you were aware that questions were being asked as to officers as to when their duty expired, in essence, in spite of that, you felt that there was no reason to bring up the fact that you had been a police officer in the past?

A That's correct.

Q And did you hear the questions made to all of the jurors by the judge, by myself, and probably by Mr. Scollon [the prosecutor] as to whether you had heard the questions put to the other jurors and whether there was anything that you wanted to bring up in regards to questions asked other jurors?

A Yes, I did.

Q And at that time you did not believe that it was your responsibility to tell the Court that you had been a police officer?

* * *

A Ms. Torres, the way I understood the question was it was my discretion as to whether I felt that any of the questions that had been asked prior by yourself

> or Mr. Scollon weighed in my ability to make a reasonable decision, and it was my judgment that my past experience would not deter me from making a good, solid decision based on the evidence presented. Appendix H 46a-48a.

In essence, Juror 4 took the jury selection process into his own hands. At the start of voir dire, the trial judge specifically instructed all of the potential jurors to volunteer information about their experiences even if they did not believe it would interfere with their function as jurors. Juror 4 explicitly admitted that he did not volunteer the information regarding his prior law enforcement experience because he did not believe that information would interfere with his function as a juror. By deliberately withholding the information, Juror 4 stripped Adair of his right to have his counsel excuse Juror 4 because of his prior law enforcement experience.

While the trial judge did not ask the venire about its past law enforcement experience, the circumstances of this case still give rise to a finding of implied bias by Juror 4. Juror 4 heard the judge ask about peace officer status. Prior to hearing that question, Juror 4 heard the judge instruct the venire to "volunteer any information about your experiences." This instruction suggested that the judge wanted the potential jurors to volunteer information about their past, as well as present, experiences. Juror 4 had to realize that the trial judge and Adair's counsel would be interested in his prior law enforcement experience, since the trial judge removed the only two potential jurors whom revealed law enforcement experience. Most significantly, when asked why he did not reveal his prior law enforcement experience, Juror 4 did not respond that the judge did not ask about past law enforcement

experience or that he did not remember his past law enforcement experience. Rather, Juror 4 stated that he thought about his past law enforcement experience and decided not to disclose that information because he determined that it did not have anything to do with his ability to reach a verdict.

In sum, based on the circumstances, the Ninth Circuit should have drawn the inference that Juror 4 deliberately failed to disclose his law enforcement experience in order to preserve his status as a juror and to secure the right to pass on Adair's sentence. The Ninth Circuit and most other circuit courts have made clear that drawing such an inference requires a presumption of bias on the part of Juror 4. Accordingly, since a biased juror sat on Adair's jury and helped decide his fate, Adair's Sixth Amendment right to a fair trial by an unbiased jury was denied.

The Ninth Circuit's failure to find that Adair's Sixth Amendment right to a fair trial by an unbiased jury was violated is due to the fact that this Court has never applied the doctrine of implied bias to a set of facts. This case provides this Court with the perfect opportunity to clarify the meaning and application of the doctrine of implied bias. Given the fact that the implied doctrine bias is a critical corollary of the Sixth Amendment right to a fair and impartial jury, this Court should take this opportunity to explicitly recognize the doctrine of implied bias and provide guidance to the lower courts with respect to the application of that doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 14, 2002

Respectfully submitted,

ALTMAN & MORRIS
PETER MORRIS
Attorneys for Petitioner
Paul James Adair

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 20, 2002]

No. 01-55905

PAUL JAMES ADAIR,	)
Petitioner - Appellant,	)
	)
v.	)
	)
VERN SMITH, Warden,	)
Respondent - Appellee.	)
	)

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-00674-VAP (E)
Virginia A. Phillips, District Judge, Presiding

May 8, 2002*, Submitted,
Pasadena, California

* This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

JUDGES:
Before KLEINFELD and GRABER, Circuit Judges, and BOLTON,** District Judge.

MEMORANDUM***

Petitioner Paul James Adair appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. We affirm.

Petitioner argues that he is entitled to a new trial under the Sixth Amendment doctrine of implied bias. *See Dyer v. Calderon*, 151 F.3d 970, 981-82 (9th Cir. 1998) (en banc) (discussing that doctrine). The implied bias doctrine applies only in certain exceptional circumstances. *Id.* at 981. Juror bias may be presumed (1) when a juror has lied in voir dire or in response to other questioning by the court, *id.* at 979; and (2) when there is "'a revelation [. . .] that the juror is a close relative of one of the participants in the trial or the criminal transaction[] or that the juror was a witness or somehow involved in the criminal transaction,'" *id.* at 982 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) (O'Connor, J., concurring)); *see also Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990). We recently recognized that the implied bias doctrine also may apply in a case in which a juror did not lie, but instead "intentionally concealed or [gave] a misleading response to a question on voir dire about relevant facts in his or a relative's

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** The Honorable Susan Ritchie Bolton, United States District Judge for the District of Arizona, sitting by designation.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

background." *Fields v. Woodford*, 281 F.3d 963, 974 (9th Cir. 2002).

None of those circumstances is present here. The undisputed facts show that Juror 4 did not lie in response to voir dire questions. There is no suggestion that Juror 4 had an improper relationship with a participant in the litigation. As the California courts found, Juror 4's failure to mention his long-ago, brief law enforcement experience cannot be characterized as concealment in view of the facts that (1) the court only inquired about current peace officer status; (2) the court's inquiry about the currency of another juror's "P.O.S.T. certification" emphasized that the court was interested in knowing only whether prospective jurors were presently peace officers; (3) neither the court nor the lawyers asked any juror about past law enforcement experience; and (4) the court invited prospective jurors to volunteer information about themselves only after the peace officers had been excused, but before voir dire, suggesting to jurors that the court was interested only in information related to the questions that were to follow.

In short, Juror 4's failure to disclose his seven-month experience as a patrol officer more than two and one-half decades before the trial does not give rise to a presumption of bias under the Sixth Amendment. Consequently, Petitioner is not entitled to habeas relief.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 20, 2002]

No. 01-55905
CT/AG#: CV-00-00674-VAP (E)

PAUL JAMES ADAIR,	)
Petitioner - Appellant,	)
	)
v.	)
	)
VERN SMITH, Warden,	)
Respondent - Appellee.	)
	)

JUDGMENT

Appeal from the United States District Court for the Central District of California, Riverside.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Riverside and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 20, 2002.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed October 22, 2001]

No. 01-55905

PAUL JAMES ADAIR, Petitioner - Appellant,	)
v.	)
VERN SMITH, Warden, Respondent - Appellee.	)

D.C. No. CV-00-674-VAP (E)
Central California (Riverside)

Before: REINHARDT, GRABER, and BERZON, Circuit Judges.

ORDER

The request for a certificate of appealability is granted with respect to the following issue: whether appellant's Sixth Amendment right to a fair trial by an impartial jury was denied when a juror failed to disclose his prior law enforcement experience during voir dire. *See* 28 U.S.C. § 2253(c)(3).

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 14 days after the date of this order, appellant shall (1) pay to the district court the $105,00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis. Failure to pay the fees or file a motion to proceed in forma pauperis will result in automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

The opening brief is due December 17, 2001; the answering brief is due January 21, 2002; the optional reply brief is due within 14 days after the service of the answering brief.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

[Filed January 3, 2001]

No. ED CV 00-674-VAP (E)

PAUL JAMES ADAIR,	)
Petitioner,	)
	)
v.	)
	)
VERN SMITH, Warden,	)
Respondent.	)
	)

NOTICE OF APPEAL

Notice is hereby given that Paul James Adair, petitioner in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a Judgment denying his Petition for Writ of Habeas Corpus by a Person in State Custody and dismissing the Petition with prejudice entered in this action on the 12th day of December, 2000.

/s/ _____

Peter Morris
Altman& Morris
Attorneys for Petitioner
Paul James Adair
1880 Century Park East, Suite 613
Los Angeles, California 90067
(310) 277-8481

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1880 Century Park East, Ste. 613, Los Angeles, California 90067

On January 3, 2001 I served the foregoing document described as:

NOTICE OF APPEAL

California Attorney General's Office
300 S. Spring Street
Los Angeles, CA 90013

Vern Smith
Warden of California State Prison
Centinela State Prison
Imperial, CA 92251-0921

X (BY MAIL IN THE ORDINARY COURSE OF BUSINESS) I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices.

X FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 3, 2001 at Los Angeles, California.

/s/ _____
Irene Reznik

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed December 7, 2000]

No. ED CV 00-674-VAP (E)

PAUL JAMES ADAIR, Petitioner,	)
v.	)
VERN SMITH, Warden, Respondent.	)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner, Petitioner's counsel, and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 7, 2000.

/s/ _____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed December 7, 2000]

No. ED CV 00-674-VAP (E)

PAUL JAMES ADAIR,
Petitioner,

v.

VERN SMITH, Warden,
Respondent.

JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: December 7, 2000.

/s/ _____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed November 20, 2000]

No. ED CV 00-674-VAP (E)

PAUL JAMES ADAIR,	)
Petitioner,	)
	)
v.	)
	)
VERN SMITH, Warden,	)
Respondent.	)
	)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on August 26, 2000.

Respondent filed an Answer on October 20, 2000. Petitioner filed a Traverse on November 3, 2000.

SUMMARY OP PETITIONER'S CONTENTIONS

After exhausting available state remedies, Petitioner challenges his conviction, arguing:

1. Petitioner allegedly was denied the effective assistance of counsel because trial counsel assertedly:

a. failed to investigate and present physical evidence of the shooting or present an eyewitness identification expert (Pet. at 6; Pet. P & A at 15);

b. failed to investigate whether defense witness Lyons had gone to school the day after the shooting (Pet. at 7; Pet. P & A at 15);

c. failed to locate or interview the alleged shooter, Phillip Villasenor (Pet. at 7; Pet. P & A at 15);

d. failed to present a better-credentialed gang expert to testify (Pet. at 7; Pet. P & A at 15);

e. failed to exclude harmful information about petitioner's gang activities and other bad acts, and did not object when the information was admitted into evidence (Pet. at 7; Pet. P & A at 16);

f. failed to move for a bifurcated trial on the count of street terrorism (Pet. at 7; Pet. P & A at 16);

g. failed to ask if any member of the venire ever had been a peace officer (Pet. at 7; Pet. P & A at 16); and

h. improperly called Petitioner as a gang expert (Pet. at 7; Pet. P & A at 16); and

2. Petitioner allegedly was denied his Sixth Amendment right to a fair trial by an impartial jury (Pet. at 7-8; Pet. P & A at 16).

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.****

I. Petitioner Claims of Ineffective Assistance of Trial Counsel Lack Merit.

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 697 (1984). The Court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *Strickland*, 466 U.S. at 697; *Thomas v. Borg*, 159 F.3d 1147, 1151. (9th Cir. 1998) ("We need not evaluate

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**** The Court has considered and rejected each of Petitioner's many arguments. The Court discusses Petitioner's principal arguments herein.

both prongs of *Strickland* test if the defendant fails to establish one"), *cert. denied*, 526 U.S. 1055 (1999).

Review of counsels performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995), *cert denied*, 519 U.S. 848 (1996); *see Strickland*, 466 U.S. at 689-90. The Court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The test is "only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.) (citations and internal quotations omitted), *rev'd on other grounds*, 525 U.S. 141 (1998).

The Court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). "In short, the defendant must surmount the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Quintero-Barraza*, 78 F.3d at 1348 (citation and internal quotations omitted). "

Mere criticism of a trial tactic is not sufficient to support a charge of ineffective representation." United States v. Ferreira-Alameda, 815 F.2d 1251, 1254 (9th Cir. 1986). That counsel's strategy proved unsuccessful does not establish counsel's ineffectiveness. *See United States v. Layton*, 855 F.2d 1388, 1420 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046

(1989), *overruled on other grounds, People of the Territory of Guam v. Ignacio*, 10 F.3d 608, 612 n.2 (9th Cir. 1993).

Considered individually or in combination, Petitioner's ineffective assistance of counsel claims do not merit habeas relief under these standards:

1. Alleged failure to investigate and present physical evidence of the shooting or present an eyewitness identification expert

Petitioner alleges his trial counsel, Celia Torres ('Torres'), should have analyzed gunshot residue on the glass pane through which the bullet traveled, the wall in which the bullet lodged, and ballistics evidence purportedly showing that the weapon fired was a rifle (Pet. Ex. A at 79). Petitioner also argues that, because Torres did not present an eyewitness identification expert to testify, she did not attack sufficiently the victim's identification of Petitioner (Pet. P & A at 15).

After interviewing Petitioner and examining photographs of the crime scene and ballistics reports, Torres decided to present an alibi defense and determined that presenting physical evidence would not support that defense (Rep. Tr. at 1002). Based on the specific facts of Petitioner's case, Torres reasonably could have believed that presenting physical evidence would not aid the chosen defense and might even distract or detract from such a defense. *Strickland* 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"); *Morris v. California*, 966 F.2d 448, 456-57 (9th Cir.), *cert. denied*, 506 U.S. 831 (1992) (if

the court can conceive of a reasonable tactical reason for counsel's action or inaction, the court need not determine the actual explanation). Moreover, Petitioner has failed to prove a reasonable probability of a different outcome had Torres investigated and presented the "physical evidence."

Torres' decision not to call an eyewitness identification expert similarly was reasonable. Before trial, Torres consulted with an eyewitness identification expert, who told Torres that the expert's testimony would hurt Petitioner"s case rather than help it (Rep. Tr. at 1027). Under this circumstance, Torres' decision not to pursue such testimony was neither unreasonable nor prejudicial. *See United States v. Quintero-Barraza*, 78 F.3d 1344, 1351 (9th Cir. 1995) (finding no ineffective assistance of counsel for failing to call a handwriting expert where the expert's opinion would have been inconsequential to the defense); *United States v. Harden*, 846 F.2d 1229, 1232 (9th Cir.), *cert. denied*, 488 U.S. 910 (1988); (counsel's reasonable decision not to call a witness generally constitutes a matter of trial tactics that the court should not second guess); *also Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1994) (counsel's decision not to call a particular witness generally is "within the realm of trial strategy"); *United States v. Long*, 674 F.2d 848, 855 (11th Cir. 1982) ("This court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses").*****

***** Furthermore, eyewitness identification testimony "is strongly disfavored by most courts." *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997) (quoting *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980).

2. Alleged failure to investigate whether defense witness Lyons had gone to school the day after the shooting

Before trial, Torres interviewed defense witness Sue Lyons, who stated that Petitioner slept over st her house on the night of the shooting and that she did not go to school the next day (Rep. Tr. at 1046-1047). Torres asked Lyons and her father to call the school to verify she had not attended that day, and Lyons reported back to Torres that the school verified she had not attended that day (Rep. Tr. at 1047). At trial, Lyons testified in accordance with the statements she made during her interview (Rep. Tr. at 514-516). The prosecutor impeached Lyons' testimony by calling a witness from Lyons' school, who testified Lyons had attended school the day after the shooting (Rep. Tr. at 715-716, 724-726).

Torres' failure to do more toward attempting to verify Lyons' reported school non-attendance was not unreasonable. Torres asked Lyons and her father to verify Lyons' story. It was not unreasonable for Torres to rely on what Lyons told her. *See United States v. Tucker*, 716 F.2d 576, 584 (9th Cir. 1983) ("the duty to investigate and prepare a witness is not limitless..."). "When a claim for ineffective assistance of counsel is alleged on the basis of failing to investigate or act, the reasonableness of the nonfeasance must be assessed in light of all circumstances, and a significant degree of deference given to counsel and his or her professional judgment." *Griffin v. Delo*, 33 F.3d 895 (8th Cir. 1994) (quoting *Strickland*, 466 U.S. at 691), *cert denied*, 514 U.S.

1119 (1995). Torres did not violate her duty to investigate by relying on Lyons and her father to verify one aspect of Lyons story.

3. Failure to locate or interview the alleged shooter, Phillip Villasenor

Petitioner contends Torres was ineffective for failure to locate Phillip Villasenor, who Petitioner argues was the actual shooter (Pet. at 15). Before trial, Lyons told Torres that the real shooter was "Phillip," later identified by police as Phillip Villasenor (Pet. Ex. D at 202; Rep. Tr. at 1018). Lyons pointed out to Torres where Villasenor supposedly lived and told Torres that Villasenor was dangerous (Rep.Tr. at 1021-1022). Torres reported this information to the police, and the police tried to locate Villasenor at the address, but were unable to do so (Rep. Tr. at 1025). When a police officer telephoned the number for "Phillip" found in Petitioner's address book, the officer spoke with someone who identified himself as "Phillip," but who hung up after the officer identified himself and asked "Phillip" if he was involved in the case (Rep. Tr. 396-397).

Petitioner fails to establish that Torres did not exercise reasonable professional judgment. It was not unreasonable for Torres to attempt to go through the police to contact a reportedly dangerous person. Furthermore, Petitioner does not suggest how Torres or her investigators would have been any more successful than the police at locating Villasenor. *Strickland* does not require an attorney to investigate or locate a potential witness who does not want to be located. *See Blair-Bey v. Nix*, 44 F.3d 711, 713 (8th Cir. 1995) ("We

decline to impose a duty on criminal defense attorneys to hire private investigators to locate recalcitrant witnesses").

Moreover, Petitioner has not shown that he was prejudiced by Torres' failure to locate and interview Villasenor. At trial, the victim did not recognize a photograph of Villasenor, and the victim testified that Petitioner, not Villasenor, was the actual shooter (Rep. Tr. at 719-720). [I]neffective assistance of counsel claims based on a duty to investigate must be considered in light of the strength of the government's case." *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). The strength of the victim's eyewitness identification of Petitioner makes it unlikely that the outcome of the case would have been different had Torres located and interviewed Villasenor. There exists no evidence Villasenor would have confessed to the crime if he somehow had been hauled into court. Petitioner's speculative claim of prejudice cannot warrant relief. *See United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) ("A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance of counsel claim"); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir.), *cert. denied*, 502 U.S. 902 (1991) (petitioner must set forth facts supporting his ineffectiveness claim and cannot rely on the conclusory allegation that speculative testimony might have benefitted him); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir.), *cert denied*, 493 U.S. 898 (1989) ("Nothing would encourage a proliferation of ineffectiveness of counsel claims more than to permit an accused to establish the prejudice prong of *Strickland* on a showing of nothing more than speculation that he had been prejudiced by his counsel's performance").

4. Alleged failure to present a better-credentialed gang expert to testify

In preparing for trial, Torres initially decided not to present her own gang expert but rather to cross-examine the prosecutor's gang expert (Rep. Tr. 1045). Torres then met with John Lyons, the father of defense witness Sue Lyons, and determined that John Lyons knew much about the area's gangs (Rep. Tr. at 1046, 1056). Torres decided to present John Lyons as an expert witness on gangs to humanize Petitioner (Rep. Tr. at 1057). Over the prosecution's objection, the trial court permitted John Lyons to give expert testimony (Rep. Tr. at 491).

Petitioner fails to demonstrate prejudice resulting from Torres' decision to present John Lyons as a gang expert instead of presenting some arguably better-credentialed or more disinterested gang expert. A habeas petitioner cannot establish prejudice through unsupported speculation regarding how a particular witness might have assisted in his defense. *See Sharp v. Johnson*, 107 F.3d 282, 290 (5th Cir. 1997) (rejecting as "mere speculation" the suggestion that counsel's failure to retain an expert witness prejudiced the petitioner). Because Petitioner has not demonstrated how a different gang expert would have altered the outcome of his trial, Petitioner has failed to carry his burden of establishing prejudice. *See Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have said is not enough to establish prejudice'); *Ashimi*, 932 F.2d at 650 ("A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance of counsel claim"); *Zettlemoyer*, 923 F.2d at 298 (petitioner must set forth facts supporting his

ineffectiveness claim and cannot rely on the conclusory allegation that speculative testimony might have benefitted him).

5. Alleged failure to exclude information about Petitioner's gang activities and other bad acts, and failure to object when information was admitted into evidence

Petitioner argues Torres should not have introduced evidence of Petitioner's gang membership and bad acts, and Torres should have objected when the prosecutor presented evidence of Petitioner's gang membership (Pet. P & A at 16, Pet. Ex. A at 91). Petitioner also argues Torres should have objected when the prosecutor solicited a comment from Petitioner regarding his silence after his arrest in March, 1995, for stealing floor mats from a car (Pet. Ex. A at 92).

At trial, Torres introduced evidence of Petitioner's gang membership and activities through Petitioner's direct testimony. Petitioner testified that he was a member of the Pinoy Real gang and that he had committed several "bad acts," including taking drugs (Rep. Tr. at 626), being arrested for commercial burglary (Rep. Tr. at 634), being stopped for driving under the influence (Rep. Tr. at 626), and being stopped for tagging (Rep. Tr. at 638).

Torres reasonably decided to present this evidence on direct examination to defuse the effect of existing and anticipated prosecution evidence regarding Petitioner's gang membership and activities (Rep. Tr. at 1042-1043). Evidence regarding Petitioner's gang membership and gang activities was relevant to the charges of attempted murder, dissuading

a witness by force or threat, and street terrorism. Any attempt to exclude such evidence would have failed. "The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel." *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.) (citation and internal quotations omitted), *cert. denied*, 493 U.S. 869 (1989).

Petitioner's argument that Torres should have objected when the prosecutor allegedly committed error under *Doyle v. Ohio*, 426 U.S. 610 (1979), also fails for lack of prejudice. The prosecutor did not ask Petitioner about his silence after his arrest for the crimes charged at trial; instead, the prosecutor asked about Petitioner's initial silence after his arrest for stealing floor mats several months before his arrest for the crimes charged at trial (Rep. Tr. at 655-656, 663). The prosecutor's questioning of Petitioner revealed that, after initially remaining silent following his arrest for stealing floor mats, Petitioner later told police he had stolen the mats (Rep. Tr. At 663-64).

Doyle error may occur when a prosecutor uses a defendant's post-arrest silence to impeach the defendant's testimony. *Doyle*, 426 U.S. at 619.****** "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." *Anderson v. Charles*, 447 U.S. 404, 408 (1980). "[A] jury's knowledge that the suspect initially remained silent is

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****** The Court assumes, *arguendo*, improper impeachment with silence following an arrest on charges unrelated to the trial charges could constitute *Doyle* error.

not a problem, when that knowledge is not used to subvert the defense in *Doyle's* fashion." *Splunge v. Parke*, 160 F.3d 369, 372 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 91 (1999). Here, as in *Splunge*, no *Doyle* error occurred because Petitioner had not held to his initial silence and the prosecutor did not exploit the initial silence. *Id.* Thus, Torres' failure to object did not prejudice Petitioner. In any event there exists no reasonable probability the result of Petitioner's trial would have been different even had the trial court excluded all evidence of Petitioner's conduct and statements following his arrest for stealing floor mats.

6. Failure to move for a bifurcated trial on the count of street terrorism

Petitioner was charged with three counts: attempted murder, dissuading a witness by force or threat, and street terrorism (Pet. at 3). Petitioner challenges Torres' failure to move to bifurcate trial of the street terrorism count (Pet. Ex. A at 90).

Had Torres moved to bifurcate Petitioner's trial, it is not reasonably probable the trial court would have granted the motion. The California Court of Appeal so ruled, applying state law (Pet. Ex. C at 23, 144-145). Federal habeas courts must defer to state courts' interpretations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Houston v. Roe*, 177 F.3d 901, 910 n.3 (9th Cir. 1999) ("Under federal habeas, we do not address violations of state law"); *Bonillas v. Hill*, 134 F.3d 1414, 1417 (8th Cir. 1998).(declining to review California Supreme Court's interpretation of state law); *see*

also Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law").

7. Failure to ask if any member of the venire had been a peace officer

At voir dire, the court asked the venire "Are any of you peace officers?" (Rep. Tr. on Appeal at 11). Noone asked if any members of the venire ever had been law enforcement officers (Rep. Tr. on Appeal at 68-70). At the end of trial, one juror ("Juror 6"[***]) revealed that he had been a peace officer for seven months in 1970 (Rep. Tr. at 940). Torres made a motion for a mistrial, alleging juror misconduct because Juror 6 did not reveal that he had been a peace officer (Rep. Tr. at 934, 950). The court denied the motion (Rep. Tr. at 961).

Petitioner has not demonstrated the outcome of his trial would have been different had Torres asked Juror 6 if he had been a peace officer and then peremptorily struck Juror 6 from the jury (Pet. Ex. A at 93). It is speculative to suggest that a jury whose membership differed by one member would have reached a different verdict. Because Petitioner has not shown that the outcome of the trial was affected by the presence of Juror 6, his claim fails for want of prejudice. *See United States v. Taylor*, 832 F.2d 1187 (10th Cir. 1987)("[A]

[***] This Report and Recommendation refers to this juror as "Juror 6." The reporter's transcript of voir dire refers to this juror as "Prospective Juror No. 4" (Rep. Tr, at 68). The reporter's transcript of the hearing on the motion for a new trial refers to this juror as "Juror Seat Number 6" (Rep. Tr. at 940). Respondent's brief refers to the juror as "J4" (Ans. at 38).

counsel's failure to exercise peremptory challenges does not give rise to a claim of ineffective assistance of counsel absent a showing that the defendant was prejudiced by his counsel's failure to exercise the challenges"); *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999)(the petitioner must show that a venire member harbored actual bias against the petitioner in order to show that attorney's failure to use a peremptory strike against a venire member was in error and prejudicial); *Odle v. Calderon*, 919 F. Supp. 1367 (N.D. Ca. 1996) (where record of *voir* dire did not provide evidence that would have caused a reasonable attorney to doubt that the venire member could be an unbiased juror, no attorney error in failing to strike venire member).

8. Allegedly improperly ceiling Petitioner as a "gang expert"

Evidence of Petitioner's gang membership was relevant to the charges of attempted murder, dissuading a witness by threat or force, and street terrorism. As previously discussed, Torres was not ineffective for introducing gang-related evidence through Petitioner himself. The possibility some of the evidence may have taken the form of expert opinion does not alter the analysis.

II. Petitioner's Sixth Amendment Claim of Dental of the Right to a Fair Trial Lacks Merit.

Juror 6 had been a peace officer in the Ontario Police Department for seven months in 1970 (Rep. Tr. at 940). Petitioner contends this fact rendered Juror 6 biased and denied Petitioner a fair trial.

The Sixth Amendment guarantees the right to a fair trial and a fair and impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). A criminal defendant has a federal constitutional right to an impartial jury. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). 'The bias or prejudice of even a single juror would violate" a defendant's right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998); *see also United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977) .

The question of individual juror bias is a question of fact. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). A state court's implied finding of juror impartiality generally is accorded a presumption of correctness on habeas review. *See* 28 U.S.C. § 2254(e) (1); 28 U.S.C. § 2254(d); *Tinsley v. Borg*, 895 F.2d 520, 525 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986); *Odle. v. Calderon*, 919 F. Supp. 1367, 1391 (N.D. Cal. 1996). The petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e) (1).

The trial court conducted an evidentiary hearing and made an implied finding of juror impartiality by denying Petitioner's motion for a mistrial (Rep. Tr. at 960-62). The state appellate court upheld the trial court's ruling (Pet. Ex. C at 130). The record does not provide "clear and convincing evidence" or, indeed, any evidence to support Petitioner's contention that Juror 6 was actually or impliedly

biased against Petitioner. No officer from the Ontario Police Department testified at Petitioner's trial. Juror 6 did not reveal that he had been a member of the Ontario Police Department until after the jury deliberation process was complete (Rep. Tr. at 930). All twelve jurors stated unequivocally they were not unduly influenced by anyone during the deliberation process (Rep. Tr. at 9S5-56). Prior employment as a peace officer does not necessarily deprive a juror of impartiality. *See Tinsley*, 895 F.2d at 528 ("We will not presume bias merely because a juror works in law enforcement or is a federal government employee"); *United States v. Le Pera*, 443 F.2d 810, 812 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971) (absent a showing of actual bias, "[b]ias and prejudice will not be presumed from the fact that a juror is engaged in law enforcement work"); *Fuller v. Bowersox*, 202 F.3d 1053, 1058 (8th Cir. 2000) (no implied bias attributed to a juror who formerly was employed by a law enforcement agency).

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: November 20, 2000.

/s/ _____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPTICAL SCANNING PROGRAM

The United States District Court for the Central District of California has developed an Optical Scanning Program which allows the Office of the Clerk to transmit copies of civil judgments, orders, and notices to attorneys of record, including notice of entry of these documents, by Interact e-mail or facsimile within 24 hours from the date the document is entered on the docket.

HOW THE PROGRAM WORKS...

- Attorneys who enroll in the program consent and agree to receive copies civil judgments, orders, notices, and notice of entry as required by Federal Rule of Civil Procedure 77(d) by Interact e-mail or facsimile.

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Thank you.

Sherri R. Carter
District Court Executive
and Clerk of Court

APPENDIX G

**IN THE MUNICIPAL COURT
SITTING AS A SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN BERNARDINO**

FWV-08451

THE PEOPLE OF THE STATE of CALIFORNIA, Plaintiff,	)
-vs-	)
PAUL JAMES ADAIR, Defendant.	)

REPORTER'S TRANSCRIPT OF JURY VOIR DIRE

BEFORE HON. JOAN M. BORBA, JUDGE PRESIDING

RANCHO CUCAMONGA, CALIFORNIA;
DEPARTMENT A

Monday, September 9, 1996, and
Tuesday, September 10, 1996

APPEARANCES:

For the People:

DENNIS L. STOUT
District Attorney
By: LYLE SCOLLON
Deputy District Attorney
8303 N. Haven Avenue
Rancho Cucamonga, CA 91730

For the Defendant:

CELIA TORRES
Attorney at Law
7201 E-495 Haven Avenue
Rancho Cucamonga, CA 91701

LYNETTE MILAKOVICH, C.S.R.
Official Court Reporter, CSR-5098

[P. 5]THE COURT: I can also sit you in a seat closer to the proceedings if that would help.

Does anyone else have trouble hearing?

Are any of you peace officers?

Please stand and give us your name, sir.

PROSPECTIVE JUROR ~~XXX~~ NUMBER 14: ~~XXX~~

THE COURT: All right. And what is your status?

PROSPECTIVE JUROR ~~XXX~~ NUMBER 14: ~~XXX~~ Correctional lieutenant, Department of Corrections.

THE COURT: You may be excused, ~~XXX~~ Thank you.

Yes, sir.

PROSPECTIVE JUROR ~~XXX~~ /NUMBER 19: ~~XXX~~ Department of Youth Authority, retired chief of security.

THE COURT: Do you have peace officer status?

PROSPECTIVE JUROR ~~XXX~~ /NUMBER 19 : Yes, I do.

THE COURT: Have you been P.O.S.T. certified within the last five years?

PROSPECTIVE JUROR ~~XXX~~ /NUMBER 19 : No.

THE COURT: Then you may not qualify.

MR. SCOLLON: Judge, I can probably shorten that. I used to work for ~~XXX~~.

THE COURT: All right. Ms. Torres, do you agree that ~~XXX~~ may be excused?

MS. TORRES : Yes.

THE COURT: You agree also, Mr. Scollon?

MR. SCOLLON: Yes.

[P. 9]A defendant in a criminal trial is presumed to be innocent until the contrary is proved, and in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.

This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt.

It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

In a moment we will begin the selection of the jury. We will start by asking certain questions of you to determine your background as it may relate to the issues of this case.

Those of you who are not initially asked to take a seat in the jury box should listen carefully to the questions so that they need not be repeated when you are in the jury box.

This questioning called voir dire is our effort to have you tell us about any experience that may influence you in hearing this case or in applying the law. You will help the process if you would volunteer any information about your experiences even though you would feel it would not interfere

with your function as a juror even though no [P. 10]question is put directly to you.

When a question is put to another juror that reminds you of something you would say, please raise your hand so that we may ask you about that experience.

If you feel your response should be given in private to me and to the lawyers, please tell us so.

In this process of jury selection, the Court and the lawyers have the right to excuse prospective jurors. If the lawyer exercises what is called a peremptory challenge, you are not to draw any inference from the exercise of that challenge, and you are not to form any negative opinion as to the lawyer or the side the lawyer represents simply because a juror has been excused. It is the lawyer's duty to make such challenges, and you are not to speculate as to the reason for that challenge.

I will now ask the clerk to fill the jury box.

THE CLERK:

Juror Number 23, ~~XXX~~
Juror Number 30, ~~XXX~~.
Juror Number 33, ~~XXX~~.
Juror Number 35, ~~XXX~~.
Juror Number 2, ~~XXX~~.
Juror Number 18, ~~XXX~~.
Juror Number 29, ~~XXX~~.
Juror Number 13, ~~XXX~~.
Juror Number 28, ~~XXX~~.

Juror Number 31, ~~XXX~~.
Juror Number 11, ~~XXX~~.
Juror Number 27, ~~XXX~~.

APPENDIX H

APPEAL NUMBER _____
COURT OF APPEAL - FOURTH DISTRICT
STATE OF CALIFORNIA

FWV-08451

THE PEOPLE OF THE STATE of CALIFORNIA, Plaintiff-Respondent,	)
-vs-	)
PAUL JAMES ADAIR, Defendant-Appellant.	)

APPEAL FROM THE MUNICIPAL COURT
SITTING AS A SUPERIOR COURT
OF SAN BERNARDINO COUNTY
HONORABLE JOAN M. BORBA,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

September 25 (p.m.), 26, 27, 1996; August 21, 1997

APPEARANCES:

For the Plaintiff-Respondent:

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and

DENNIS STOUT
District Attorney .
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San Bernardino, CA 92415

For the Defendant-Appellant:

PAUL JAMES ADAIR
In Propria Persona

Reported by:

Lynette Milakovich, CSR-5098
Official Court Reporter

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PAGES 817 through 1113, inclusive

[P.930] **RANCHO CUCAMONGA, CALIFORNIA**

FRIDAY, SEPTEMBER 27, 1996; 8:30 A.M.

DEPARTMENT F (RC)

HON. JOAN M. BORBA, JUDGE
APPEARANCES:

(Appearances as heretofore noted.)

(Lynette Milakovich, C.S.R., Official Court Reporter.)

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(The jury continued deliberatiions.)

THE COURT: People versus Adair, FWV-04851.

State your appearance, please.

MS. TORRES: Celia Torres, your Honor, appearing for Mr. Adair who is present in custody.

MR. SCOLLON: Lyle Scollon for the People.

THE COURT: I have received a note from the jury as follows: "To speak with the judge or be reassured as to one of the jurors has now brought out that he was a former active officer with the Ontario Police Department. This didn't come out during voir dire, and we as a jury don't feel that it influenced our decisions. We didn't know until after the decisions were made, but the man is has been very vocal and forceful in his opinions. Does this make any difference in our case?"

Have you both reviewed this note?

MR. SCOLLON: Yes.

MS. TORRES: Yes.

THE COURT: And have you discussed it, counsel?

MS. TORRES: Yes, we have, your Honor.

MR. SCOLLON: Yes. But prior to that note, it was

[P. 940] THE COURT: We are on the record in open court.

And (Juror Seat Number 6) is present. No other jurors are present. Again Mr. Adair is present represented by counsel. The People are represented.

JUROR SEAT NUMBER 6
EXAMINATION

BY THE COURT:

Q (Juror Seat Number 6), we've received a note from the jury, as you know, and it indicates that you were a former active officer with Ontario P.D.

Could you give us some information about your activities as a police officer, when you were a police officer and what you did.

A Yes. I was hired by Ontario Police Department May of 1970, and I was assigned to patrol duty, and I quit that same year, 1970.

Q And may we inquire as to why you quit, sir?

A It was not my -- it was very easy to see it was not my cup of tea. At that particular time I had just been discharged from the military and returned from Vietnam, and I found that I was in an extremely, we'll say, volatile state. I wasn't a happy camper. And being a police officer was not the best interest for myself or my family.

Q Why didn't you inform us of this during the jury selection process?

A I didn't believe that my experiences 26 years ago had anything to do with my ability to reach a verdict.

Q Do you remember if a question was put directly to [P. 941] you in that regard?

A Whether I had been a police officer?

Q Yes.

A To the best of my knowledge, no, it was not directed to me.

THE COURT: Do counsel want to inquire as to Mr. Benson?

MR. SCOLLON: Just briefly.

Could I have this marked as an exhibit?

THE COURT: Yes. We'll mark it Court's Exhibit 1.

EXAMINATION

BY MR. SCOLLON:

Q (Juror Seat Number 6), I'm showing you What's been marked as Court's Exhibit 1. Do you recall each of the prospective jurors was given this card to review and answer questions regarding this?

A Yes, I do.

Q Is there any request there regarding peace officers?

A No, there's not.

Q And do you recall if anyone asked you -- do you recall my questions to you regarding did you know any peace officers?

A Yes.

Q And you indicated, I believe, that you had an occasional contact with a deputy from L.A.?

A Actually it's San Bernardino.

Q San Bernardino?

A Yes.

[P. 944] JUROR SEAT NUMBER 6: I do.

THE COURT: Thank you.

Please Continue.

MR. SCOLLON: Thank you.

Q (BY MR. SCOLLON:) Did your seven-month experience back in 1970 affect your personal decision in this matter?

A No, it did not.

Q And do you feel there was anything you said or could have mentioned to the other jurors in voicing your opinions asto this evidence that could sway them because of your prior police experience?

A No.

MR. SCOLLON: I have nothing further.

THE COURT:

MS. TORRES: Ms. Torres, you may inquire.

MS. TORRES: Yes, your Honor.

EXAMINATION

Q Sir, you indicated that you did not bring this up because you did not believe that your experience 25 years

oago would have any effect on your experience as a juror in this particular case; is that correct?

A My ability to reach a decision, yes.

Q And this is a thought process that you consciously made as we were going through the procedure of talking to you; is that correct?

A I'm sorry? You're asking if I --

Q Is this a decision that you made at the time that you were being questioned as to your capabilities as a [P. 945] prospective juror?

A Yes, ma'am.

Q Now, you were present when the rest of the jurors were being questioned; is that correct?

A Correct.

Q And you were also present when the judge asked Whether there were any active police Officers in the jury panel; is that correct?

A Yes, I was.

Q And you also saw that those police officers were excused summarily; is that correct?

A I'm not sure that there were any active police Officers. I don't recall. I do recall one of the questions asked

was the last day of P.O.S.T. certification which seemed to the Court to have been an important issue, so I felt that 26 years ago was unimportant at that time. I felt that I had more experiences in the meantime that allow me to reach decisions. It was a very minute portion of my life experiences.

Q And in spite of the fact that you were aware that questions were being asked as to officers as to when their duty expired, in essence, in spite of that, you felt that there was no reason to bring up the fact that you had been a police officer in the past?

A That's correct.

Q And did you hear the questions made to all of the jurors by the judge, by myself, and probably by Mr. Scollon as to whether you had heard the questions put to the other [P. 946] jurors and whether there was anything that you wanted to bring up in regards to questions asked other jurors?

A Yes, I did.

Q And at that time you did not believe that it was your responsibility to tell the Court that you had been a police officer?

MR. SCOLLON: I'm going to object as argumentative as to what his responsibility was.

THE COURT: Well, it has been asked and answered. He has indicated that he did not feel it was important enough to mention.

MS. TORRES: I'm asking it in a different sense. I'm asking if he was aware that the question was being asked of everybody else and, even if it wasn't asked directly of him, whether he was aware that he had a responsibility to let the Court know.

THE COURT: You may answer the question, (Juror Seat Number 6), if you understood the question.

JUROR SEAT NUMBER 6: I did understand the question, but may I clarify my answer other than just yes?

THE COURT: Certainly.

JUROR SEAT NUMBER 6: Ms. Torres, the way I understood the question was it was to my discretion as to whether I felt that any of the questions that had been asked prior by yourself or Mr. Scollon weighed in my ability to make a reasonable decision, and it was my judgment that my past experience would not deter me from making a good, solid
decision based on the evidence presented.

[P. 948] Counsel, do you agree (Jury *Foreperson)* should be placed under oath? I believe it would be appropriate.

MS. TORRES: Yes.

MR. SCOLLON: Can you give him the prior testimony oath also since he was questioned by you?

THE COURT: Yes.

(The foreperson entered the Courtroom.)

THE COURT: (Jury Foreperson), we are going to place you under oath at this time.

THE CLERK: You do solemnly swear that the testimony which you are about to give in the matter pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE FOREPERSON I do.

THE CLERK: You do also solemnly swear the testimony previously given in this matter was the truth, the whole truth, and nothing but the truth, so help you God?

THE FOREPERSON: I do. It was.

JURY FOREPERSON/SEAT NUMBER 1

EXAMINATION

BY THE COURT:

Q (Jury Foreperson), your note states that you became aware that (Juror Seat Number 6) was a former peace officer with Ontario Police Department after your decision was made. By that, do you mean after you had reached a verdict?

A Correct.

Q And can you tell us how that information came about.

A If I remember correctly, all the jurors were sitting [P. 949] at the table except for one that was in the restroom, and he just -- something came up about him. I think he just brought it up casually from a statement that somebody had said about being an officer or knowing an officer or something about an officer, and he said, oh, 26 years ago I was one at Ontario. Actually it wasn't a very big thing except to one person, and we didn't want to --

Q Had you signed and dated all the verdict forms at that point?

A Yes, we had signed and dated all the verdict forms.

Q How long had you finished deliberations at that point?

A Five to fifteen minutes. Exactly how long, I'm not sure.

Q You also state in here that it did not influence your decisions. However, you do say that the man is, has been very vocal and forceful in his opinions.

So the fact that he was a former peace officer did not influence your decisions; is that correct?

A Correct. Just his demeanor was a strong-willed person, an individual who spoke his mind.

Q Do you think that his demeanor per se caused the rest of you to decide in a way that you would not have decided?

A Not at all.

THE COURT: Would counsel like to inquire?

MR. SCOLLON: No.

THE COURT: Ms. Torres?

[P. 955] (The jury entered the courtroom and sat in their respective places.)

THE COURT: People versus Adair, FWV-08451.

Mr. Adair is present represented by counsel. The People are represented. Twelve jurors are present.

Members of the jury, I'm going to ask you each one question, and I want you to respond with a yes-or no answer and not to give me any additional information. If I need more information, I will inquire.

Juror Number i, has anyone unduly influenced you in your deliberation process?

JUROR FOREPERSON/SEAT NUMBER 1: No.

THE COURT: Juror Number 2, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 2: No.

THE COURT: Juror Number 3, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 3: No

THE COURT: Juror Number 4, has anyone undulyinfluenced you in your deliberation process?

JUROR SEAT NUMBER 4: No.

THE COURT: Juror Number 5, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 5: No.

THE COURT: Juror Number 6, has anyone unduly [P. 956] influenced you in your deliberation process?

JUROR SEAT NUMBER 6: No.

THE COURT: Juror Number 7, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 7: No.

THE COURT: Juror Number 8, has anyone unduly [P. 956] influenced you in your deliberation process?

JUROR SEAT NUMBER 8: No.

THE COURT: Juror Number 9, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 9: No.

THE COURT: Juror Number 10, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 10: No.

THE COURT: Juror Number 11, has anyone unduly influenced in your deliberation process?

JUROR SEAT NUMBER 11: No.

THE COURT: Juror Number 12, has anyone unduly influenced you in your deliberation process?

JUROR SEAT NUMBER 12: No.

THE COURT: Thank you, members of the jury.

Please follow the bailiff back into the jury deliberation room.

(The jury exited the courtroom.)

THE COURT: All right. Counsel, I would now ask the court reporter to take a quick break, review her notes, and as soon as possible, I'll ask her to read back portions of jury selection as to specifically (Juror Seat Number 6).

Now, the other problem is there were questions posed to the twelve and questions posed to the larger group. If we have readback as to that, it will take a lot more time.

[P.957] I specifically asked everyone if they had peace officer status. I know I asked the large group at the beginning of jury selection. I don't think that needs to be read back. Do you agree?

MR. SCOLLON: Correct.

MS. TORRES : Correct.

THE COURT: And then we posed questions to the larger group as to whether they had friends or relatives in law enforcement.

MR. SCOLLON: Correct.

THE COURT: I do not remember any of us specifically asking anyone if they had prior peace officer experience. That's my recollection of the jury selection process.

MR. SCOLLON: That's my recollection.

THE COURT: Ms. Torres.

MS. TORRES: That's my recollection, too. But I also asked the juror if he recalled the questions relating to whether people had been police officers in the past, and as to when they had been -- that's not what I asked.

He talked about the fact that he was aware that questions relating to police officer status were being asked, and he specifically talked about the fact that he was aware that there was a question -- that there were questions as to when

their police officer status expired, so that points to the fact that questions were asked relating to when people were police officers, and that was for the purposes of using challenges.

So my point is that we need to look at the [P.958] questioning for everybody, and I know that's going to take time, but he was specifically asked whether he was aware and listened to the questions that were being asked of everybody and whether he took that into account when he consciously chose not to tell the jury (sic) that he had been a police officer.

So I know it's going to take time, but I think it's necessary.

THE COURT: I did inquire, as I recall, if anyone had been P.O.S.T. certified within the past five years, and he was a peace officer in 1970, so he would not have responded to that question either.

MR. SCOLLON: Judge, if I can be heard briefly.

THE COURT: Yes.

MR. SCOLLON: Prospective Juror Number 14, (Prospective Juror Number 14), when you asked the questions, has anybody been a peace officer, raised his hand. He indicated he was a lieutenant for the (omitted). You summarily dismissed him without further discussion.

(Prospective Juror Number 19) raised his hand He was a retired C.Y.A. supervisor. You started questioning him whether or not he still had peace officer status. He said yes.

I said, I can save all this; he was my boss. He was excused by stipulation immediately.

That was the only discussion regarding, by my memory, as to any kind of peace officer status.

The only other questions asked were some jurors as to do they know or have any current peace officer [P.959] affiliation or association.

MS. TORRES: Right there. Know or have any current peace officer association, affiliation.

THE COURT: Current being the relevant word, I think, in that question.

MR. SCOLLON: The other thing is that I believe if time was spent, you would find that the Court instructed the jury that we were looking for people who could sit on this jury, keep an open mind and be fair to both sides.

Also that when I made my statement, I said the role that the lawyers play is to find jurors who can be fair to both sides and asked them if there's anything in their opinion that would affect their ability to do that. It wasn't specific as to police officers, former peace officers, or anything like that, and that's why it's my belief anyway that (Juror Seat Number 6) said, I was under the impression it was up to my discretion if it was a concern to me, and he said it wasn't.

THE COURT: That's my recollection also.

What we can do, Ms. Torres, we can begin with readback as to questions specifically to (Juror Seat Number 6), and then we'll chat again. That may be dispositive of how we'll proceed depending on what is read back.

(A portion of the record was read by the reporter.)

THE COURT: I just had a brief conversation with my court reporter asking her if there were any other questioning [P. 960] that she could see directly to (Juror Seat Number 6). She said what she read to us was everything that she had marked as far as direct inquiries to (Juror Seat Number 6).

I know I did ask other questions of the entire group, and we'd have to take some time to go through that.

Ms. Torres, you had an opportunity to inquire as to this individual regarding whether he was a peace officer in the past, and I feel comfortable based on the inquiries that I've made. My recollection of jury selection and listening to the jury questions on specifically to Mr. Benson that have just been read back by the court reporter is that no one was unduly influenced in the deliberation process and that he was candid with the attorneys and forthright in his answering questions.

MS. TORRES: Your Honor, as I indicated before, whatever his effect on the jurors was is of no moment to me at this point.

My problem is that during the course of the jury selection he was present, and he heard when a police officer, a retired police officer, was excused.

He was also present when he -- when the questions were being asked as to whether anybody knew, was associated with, had family that were police officers.

He was well aware of the fact that the Court and the officers of the Court were inquiring as to his ability to be fair to both sides, and part of the consideration as to whether you're going to be fair to both sides is whether you are a police officer, you are associated [P. 961] with police officers, or whether you have been a police officer.

He indicated that he consciously chose not to reveal that information after becoming aware that those questions were important.

That was the brunt of my questioning to him.

It was also the brunt of my initial question to him which was: Does anything that we've talked about stick out in your mind that you would like to talk about here in this courtroom? He chose not to let us know that he was a police officer. Therefore -- and he chose not to let us know because, according to him, he felt that that would have no effect upon whether he would be a good juror or not.

What he didn't tell us and what is obvious from the fact that he is a police officer is that he didn't want us to know because he wouldhave been off that jury as soon as he made that statement.

So based upon his experience as a police officer, he would know that I would not want him in that jury, and he consciously, consciously, chose to not reveal that information, and that is error, and you should grant my motion for a mistrial at this point.

THE COURT: Under the circumstances, Ms. Torres, the fact that he was a police officer for a period of seven months in 1970, I think the fact that he didn't reveal it to us is not important. I think that he was justified based upon his rationale for not disclosing that information.

MR. SCOLLON: I take it the Court is denying the [P.962] motion for mistrial.

THE COURT: Unless you want to argue further and me rule on it.

MR. SCOLLON: No.

THE COURT: The motion for mistrial is denied.

I'm ready to take the verdict at this time.

Please bring the jurors out.

(The jury entered the courtroom and sat in their respective places.)

THE COURT: People versus Paul Adair, FWV-08451.

Mr. Adair is present represented by counsel.

The People are represented.

Twelve jurors are present.

Who is the presiding juror in this case?

THE FOREPERSON: I am.

THE COURT: Has the jury arrived at a verdict?

THE FOREPERSON: Yes, we have.

THE COURT: I have received the verdict forms from the presiding juror. They have been sealed. I am opening them at this time.

Madam clerk, please read the verdicts.

THE CLERK: Superior Court of California, county of San Bernardino. The People of the State of California versus Paul James Adair. Verdict. We, the jury in the above-entitled action, find the defendant, Paul James Adair, guilty of the crime of attempted murder as charged in the information as to Count 1.

We, the jury in the above-entitled action, find [P. 963] the defendant -- that the attempted murder of Richard Yusuf Shaw was willful, deliberate, and premeditated to be true as to Count 1.

We, the jury in the above-entitled action, find the allegation that in the commission and attempted commission of the above offense, the said defendant, Paul James Adair, personally used a firearm to be true as to Count 1.

We, the jury in the above-entitled action, find the allegation that the above offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in a criminal conduct by gang members to be true as to Count 1.

We, the jury in the above-entitled action, find the allegation that in the commission of the above offense, the said defendant, Paul James Adair, with the intent to inflict such injury personally, inflicted great bodily injury upon Richard Yusuf Shaw, not an accomplice to the above offense, to be true as to Count 1.

We, the jury in the above-entitled action, find the defendant, Paul James Adair, guilty of the crime of dissuading a witness by force or threat as charged in the information as to Count 2.

We, the jury in the above-entitled action, find the allegation that the above offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, [P. 964] further, or assist in a criminal conduct by gang members to be true as to Count 2.

We, the jury in the above-entitled action, find the allegation that in the commission and attempted commission of the above offense, the said defendant, Paul James Adair, personally used a firearm to be true as to Count 2.

We, the jury in the above-entitled action, find the allegation that in the commission of the above offense, the

said defendant, Paul James Adair, with the intent to inflict such injury, personally inflicted great bodily injury upon Richard Yusuf Shaw, not an accomplice to the above offense, to be true as to Count 2.

We, the jury in the above-entitled action, find the defendant, Paul James Adair, guilty of the crime of street terrorism as charged in the information as to Count 3.

We, the jury in the above-entitled action, find the allegation that in the commission and attempted commission of the above offense, the said defendant, Paul James Adair, personally used a firearm, to be true as to Count 3.

We, the jury in the above-entitled action, find the allegation that in the commission of the above offense, the said defendant, Paul James Adair, with the intent to inflict such injury, personally inflicted great bodily injury upon Richard Yusuf Shaw, not an accomplice to the above offense, to be true as to Count 3.